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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1951

No. 503

ROBERT H. REMMEY, JR., CLARENCE E. BERTOLET, FRANK BRUCKERL,

Appellants,

vs.

GENE D. SMITH, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA AND ANTHONY J. DESILVESTRO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

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Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 12124

ROBERT H. REMMEY, JR., CLARENCE E. BERTOLET, FRANK BRUCKERL,

Plaintiffs,

vs.

GENE D. SMITH, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA AND ANTHONY J. DESILVESTRO, ET AL.

STATEMENT AS TO JURISDICTION

The plaintiffs, Robert H. Remmey, Jr., Clarence E. Bertolet and Frank Bruckerl, by S. Lloyd Moore, Esq., of Moore, Panfil & James, their attorneys of record, present this jurisdictional statement in accordance with Rule 12 of the Supreme Court of the United States.

I. Statutory Provision Believed to Sustain Jurisdiction

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under the United States Code, Judiciary and Judicial Procedure, June 25, 1948, 62 Stat. 926, 28 U. S. C. A., Sec. 1253, which reads as follows:

> SEC. 1253 Direct Appeals from decisions of three-judge Courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

II. Statutes of the State, Validity of Which Is Involved

The statutes which the plaintiffs attack as being contrary to the Constitution of the United States are:

Pennsylvania Laws, 1921, May 10, P.L. 449, amended 1923; April 26, P.L. 106; No. 80, section 1; 25 P.S. 2201; Pennsylvania Laws, 1921, May 10, P.L. 455; amended 1923; April 26, P.L. 98, section 1; 1923 May 8, P.L. 172, section 1; 1923 May 15, P.L. 206, section 1; 1923 P.L. 942, section 1; 1929 April 30, P.L. 877, section 1; 25 P.S. 2210.

The above Pennsylvania Laws established an apportionment system for the election to the State General Assembly of Senators and Representatives respectively. Both Acts are based on the United States decennial census of 1920. Cf. Sections 2 of above Acts 25 P.S. 2202 and 25 P.S. 2211. The said Acts apportion the Commonwealth of Pennsylvania into fair and equal Senatorial and Representative districts according to the population of the Commonwealth in 1920 in conformity with Article III, Section 16 and 17 of the Constitution of the Commonwealth of Pennsylvania.

To be considered in connection with relief sought are the following provisions of the Constitution of the Commonwealth of Pennsylvania:

A. Article III, Section 18, Constitution of Commonwealth of Pennsylvania, attached hereto as Exhibit "A".

B. Article III, Section 16 and 17 Constitution of the Commonwealth of Pennsylvania, attached hereto, as Exhibit "B".

III. Date of Judgment or Decree and Appeal

The final order of the District Court sought to be reviewed was filed on September 22, 1951, and a copy of same is attached hereto as Exhibit "C".

The date upon which application for appeal was presented was November 15, 1951.

IV. Nature of the Case

A. Facts

The plaintiffs are registered voters of the City of Philadelphia, Commonwealth of Pennsylvania. They individually complain of deliberate unlawful discrimination over their right to vote by the General Assembly of Pennsylvania.

As shown in Exhibit "A", the Pennsylvania Constitution requires the General Assembly to apportion the State into Senatorial and Representative districts after each United States decennial census, Article II, Section 16 and 17 of the said Constitution of Pennsylvania prescribe the method of apportionment. The General Assembly is to be elected by the people on a basis of equal representation of the population. Exhibit "B".

When the apportionment acts cited in paragraph II of the Statement were passed, the distribution of districts was roughly equal in population. However, this was in 1921, and since that date no successful reapportionment legislation has been passed. Since 1921 the population has shifted in Pennsylvania. The result is that the districts under the 1921 apportionment Acts are no longer equal, and, in fact, are grossly disproportionate. Plaintiffs vote in one of the most heavily affected representative districts and in one of the most disproportionate senatorial districts in the City of Philadelphia. For example, in plaintiffs' Representative district there are 257,373 persons who elect one

representative. In the ninth representative district (8,767 persons) one representative is also elected. Thus, every vote cast in the ninth district for a Representative is 29.3 times more effective than one cast in the plaintiffs' district. The same distortion to the disadvantage of plaintiffs is true in the Senatorial districts.

This discrimination has not been accidental. Since 1931, at every regular session of the legislature, attempts have been made to reapportion. Thirty-eight bills and two resolutions have been introduced. Very few of these even moved out of committee. Only two were passed. Pennsylvania Laws, 1937 June 30, P.L. 2454 and P.L. 2443, 25 P.S. 2209a, 2213. These bills were immediately declared unconstitutional by the Common Pleas Court of Dauphin County in 1938 because they were so carelessly drafted. *Shoemaker* v. *Lawrence*, 31 Pa. District Court Reports 681 (1938).

Since the beginning of the 1951 General Assembly both political parties have publicly committed themselves to reapportion the State Legislative Districts. Cf. Exhibit "D" (letter from Governor John A. Fine). As of this date no reapportionment bill has been passed by the legislature, nor has one come out of committee.

A typical stand of the legislators was taken by Senate majority leader John M. Walker when on April 16, 1951 he said from the floor of the Senate referring to an attempt to serve process on him in the present suit:

> "May I suggest also Mr. President that you cannot have congressional reapportionment spearheaded on the bayonet end of any mandamus proceeding of any disgruntled taxpayer who has the right to run for public office if he has the intestinal fortitude."

Commonwealth of Pennsylvania, Legislative Journal, Session 1951, Vol. 32, No. 37, page 1541.

B. Plaintiffs' Suit

Disgusted after years of effort through the Northeast Philadelphia Chamber of Commerce of which they are also officers, to secure a reapportionment, plaintiffs individually as registered voters, took the matter to the Federal Courts on April 11, 1951.

Plaintiffs sought a declaratory judgment under the United States Code, Judiciary and Judicial procedure, June 25, 1948, 62 Stat. 964 as amended 635 Stat. 105, 28 USCA sec. 2201 and 2202:

> "Chapter 151—Declaratory Judgments. Sec. 2201. *Creation of Remedy.* In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139 Sec. 111, 63 Stat. 105.
>
> Section 2202. *Further relief.*
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

They asserted that the Federal Courts have original jurisdiction of this matter under the Civil Rights Act, 17 Stat. 13, 8 USCA, Sec. 43 and U.S. Code Judiciary and Judicial procedure, June 25, 1948, 62 Stat. 932, 28 USCA Sec. 1343. These read as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in or action at law, suit in equity, or other proper proceeding for redress. (R.S. Sec. 1979)."

Tit. 28 U. S. Code Judiciary and Judicial Procedure (with Amendments to January 1, 1951) provides, inter alia, as follows:

"Sec. 1343. *Civil Rights.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights to citizens or of all persons within the jurisdiction of the United States."

Plaintiffs prayed for a permanent injunction restraining the Secretary of the Commonwealth from proceeding with elections for members of the General Assembly under the reapportionment Acts now in effect. Plaintiffs also asked for general relief. Because the constitutionality of state statutes were involved (See paragraph II of this Statement as to Jurisdiction) a three judge court was requested under the United States Code, Judiciary and Judicial procedure June 25, 1948, 62 Stat. 968, 28 USCA, sec. 2281, which reads as follows:

Chapter 155 Injunction; Three Judge Courts. Sec. 2281. *Injunction against enforcement of State Statute; three-judge Court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any

> State Statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The Secretary of the Commonwealth of Pennsylvania, Gene D. Smith, was named defendant along with all the members of the 1951 General Assembly of Pennsylvania.

On May 15, 1951 a Motion to dismiss the suit was filed by the Department of Justice of Pennsylvania.

On May 21, 1951 Hon. Thomas J. Clary, District Judge, entertained a preliminary argument on the application to convene a three judge court.

At this hearing Special Deputy Attorney General, Abraham I. Levy, from the Department of Justice of Pennsylvania entered his appearance for all defendants.

On June 26, 1951 a three judge court was convened by Judge Clary, consisting of Hon. John Biggs, Jr., Circuit Judge, Hon. Guy K. Bard, District Judge, and the said Judge Clary. On July 26, 1951 hearing and argument was had before the said court. No evidence was considered pending the determination of the question of federal jurisdiction.

On September 22, 1951, plaintiffs' suit was dismissed for want of equity. The Court's opinion which was handed down by Hon. John Biggs, Jr., Circuit Judge (attached hereto as Exhibit "E") dismissed the suit for want of equity on the grounds that plaintiffs had not exhausted their state remedies, and that the suit was premature since the 1951 General Assembly had not adjourned and could still possibly reapportion. Said opinion, however,

expressly reserved any decision on whether or not the complaint presented a justiciable issue saying "a suit based on the Third Civil Rights Act, 17 Stat. 13; 8 U.S.C.A. Sec. 43, as well as the Fourteenth Amendment, may present novel questions, not as yet decided.

Hon. Guy K. Bard, District Judge, wrote a concurring opinion (attached hereto as Exhibit "F") which maintained that the question raised by the Complaint was not federal.

The present appeal to the Supreme Court of the United States is from the above final order.

V. Grounds of Federal Jurisdiction

While the Federal Courts and the Supreme Court of the United States have to a certain extent touched on problems somewhat similar to that raised by this suit, never has jurisdiction been squarely entertained nor has it been finally denied. Each time reapportionment has reached the federal courts, it has not been squarely met. *Colegrove* v. *Green*, 328 U.S. 549, 90 L. Ed. 1932 (1945); *MacDougall* v. *Green*, 338 U.S. 1, 93 L. Ed. 3 (1947); *South* v. *Peters*, 339 U.S. 216, 94 L. Ed. 834 (1950).

Plaintiffs' suit is free of the difficulties involved in the above cases. This case forces an examination of the basic premises of the reapportionment problem. Involved here is a classic defect of representative republican government. Little issue has been taken with the proposition that a person with the right to vote should have a ballot of equal effect with other votes. Reapportionmentwise this means that periodic redistricting must take place to adjust to population changes. The defect which prevents the above principle from being a fact is that the elected representatives of the voters are sometimes politically injured by redistricting. Since these elected representatives have the duty of redistricting, they control its occurrence. No redis-

tricting at all is the customary result, and, in Pennsylvania, has been the result for twenty years.

The doctrine of separation of powers or "political question" has been the chief reason for judicial hesitancy in this field. *Colegrove* v. *Green*, supra. However, this doctrine has no place in a case where (a) no legislative body other than the culprit assembly may regulate; (b) no feasible remedy exists elsewhere than in the judiciary; (c) no sound policy basis for the failure to redistrict exists.

A. The Federal Court Has Jurisdiction of This Case

Plaintiffs right arises primarily under the Constitution of the United States,—their right as citizens to vote, unabridged by any state law whether directly or indirectly; and the Federal Court has full power to give plaintiffs proper protection of that right.

Every qualified voter in the State of Pennsylvania has the right to be protected against the effect of any law or statute of the State of Pennsylvania which destroys the effectiveness of his vote. That is what the Fourteenth Amendment protects against and for which the Federal Courts are given original jurisdiction to provide a proper remedy.

The providing of said remedy can under no stretch of the imagination be said to be an usurpation of the prerogative of the legislative branch of the government; nor can it be said to be an attempt to compel the legislature to act.

1. Violation of the 14th Amendment.

Plaintiffs maintain, that they have been denied the right to vote by the failure of the General Assembly of the Commonwealth of Pennsylvania to reapportion the State Legislative Districts as required by the Constitution of the

Commonwealth of Pennsylvania. *Article II Sections 16, 17 and 18.*

The Pennsylvania Constitution directs that the General Assembly reapportion according to population after each decennial census. This has not been done since 1921, and the population shifts since then have caused a severe disproportion in the number of people represented by each legislator. The weight of plaintiffs' votes has been decreased in relation to other districts. Consequently, plaintiffs do not have an equal vote. *Pa. Laws 1921, P.L. 449 and 455; 25 P. S.* Sections 2201, 2210, which establish the Legislative Districts in Pennsylvania, therefore, violate the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.

(a) The right to vote.

This problem has an analogy, i.e. the now well established doctrine that intentional prevention of the negro from voting is a violation of the Fourteenth Amendment of the United States Constitution, *Smith* v. *Allwright*, 321 U.S. 649, 88 L. Ed. 987 (1944). This right to vote created and protected by the Federal Courts is on all fours with plaintiffs' Complaint. On it they rest their case.

The analogy is that if the negro has a right to vote *Nixon* v. *Herndon*, 273 U.S. 536, 71 L. Ed. 759 (1927) and to have his vote counted equally with every other vote, *U. S.* v. *Saylor*, 322 U.S. 385, 88 L. Ed. 1341 (1944); *Klein* v. *U.S.*, 176 F. 2d 184 CCA, 8th (1949) then it follows that every citizen has the same rights. No one has disputed the claim that intentional failure to reapportion reduces or dilutes the effect of the votes cast in the more populous districts of a state. Cf. *Colegrove* v. *Green*, 64 F. Sup. 632 (1945). Certainly, if the legislature by statute gave some citizens one-half a vote and others a full vote, or if the legislature passed a law electing all of the General Assembly

from the City of Philadelphia, this would be a violation of equal protection of the laws. The subtlety of discrimination has never influenced the Federal Courts before. *Smith* v. *Allwright*, 321 U.S. 649, 88 L. Ed. 987 (1944); *Lane* v. *Wilson*, 307 U.S. 268, 83 L. Ed. 1281 (1939).

Almost every line of inquiry down which the reapportionment problem may go turns up a voting right case supporting the right of the individual to an equal vote.

The likeness in the voting and reapportionment cases can be seen by the way *Colegrove* v. *Green (supra)* has caused lower Federal Courts to make unjustified inroads in the negro voting right cases. *Craven* v. *Clark*, 78 F. Sup. 295, 302 (W. Dist. Ark. 1948).

The analogy became more than a logical matter in *South* v. *Peters*, 339 U. S. 276, 94 L. Ed. 834 (1950). There reapportionment and the right of the negro to vote collided. In Georgia not only the negro, but every city dweller has been controlled at the polls by the County-unit vote. This is an electoral voting system by county favoring the less populous counties which counties also have smaller proportion of negroes in them. Some Georgia citizens contending that this method of election was unconstitutional petitioned the Federal Courts. The Supreme Court held that they would not take jurisdicion of the matter on the authority of *Colegrove* v. *Green (supra)* and *MacDougall* v. *Green*, 338 U. S. 1, 93 L. Ed. 3 (1947).

The bad effect this decision will have is one of the best illustrations of the similarity of the problems. Ever since *Nixon* v. *Herndon (supra)*, the Supreme Court has built up a doctrine protecting the right of the negro to vote. The court has reached into every part of the electoral system to do this. Many Southern legislatures in turn have used every stratagem they could to bar the negro from the polls, and so far have been unsuccessful. Cf. *Giles* v. *Long*, 172

Tenn. 471, 113 S. W. 388 (1938) (attempt to restrain negroes from voting by gerrymander unsuccessful).

In view of the previous activities of the Southern legislatures there is little doubt that the gerrymander will now be used to insure white supremacy. *South* v. *Peters (supra)* at page 278. Dissent by Justice Douglas.

(b) The protection of the right to vote is not limited to the Fifteenth Amendment.

The right to vote, as established by these cases, is not predicated on racial discrimination. It is obvious that racial prejudice was the reason the cases defining the right to vote arose. However, the negro right to vote was not upheld because he suffered discrimination. The right to vote belongs to all qualified citizens of the United States, and no state may infringe on this right.

The legislative history of the Civil Rights Act clearly shows that the statute protects all rights of the Federal Constitution. *Nixon* v. *Herndon*, 273 U. S. 536, 71 L. Ed. 759 (1927); *Nixon* v. *Condon*, 286 U. S. 73, 76 L. Ed. 984 (1931) leading negro voting cases were decided under Civil Rights Act and the Fourteenth not the Fifteenth Amendment. They involved primary elections, and the Court did not touch the Fifteenth Amendment since primaries were not clearly part of the electoral process.

In *U. S.* v. *Classic*, 313 U. S. 299, 85 L. Ed. 1368 (1941) a footnote (p. 327) spells out the legislative history of the Civil Rights Act. It is clear from this that in spite of the phrasing of the statute, it was intended to protect all persons and all rights under the Federal Constitution. (This footnote was material in the above case because the court was discussing a U. S. Criminal Statute closely related to the Civil Rights Act.

Hague v. *CIO*, 307 U. S. 496, 83 L. Ed. 1423 (1939) was a case under the Civil Rights Act where a New Jersey Ordi-

nance infringed on freedom of speech. The Court gave broad interpretation to the word "rights" in the Civil Rights Act. Although this case was not one of voting rights, it does show that the Civil Rights Act is not restricted to racial discrimination problems.

Colegrove v. *Green*, 328 U. S. 549, 90 L. Ed. 1932 (1945); *MacDougall* v. *Green*, 338 U. S. 281, 93 L. Ed. 3 (1947); and *South* v. *Peters*, 339 U. S. 276, 94 L. Ed. 834 (1950) are all authority that the Civil Rights Act with the proper set of facts is the place to raise the question of reapportionment.

U. S. v. *Saylor*, 322 U. S. 385, 88 L. Ed. 1341 (1944) and *U. S.* v. *Klein*, 176 F. 2d 184 CCA 8th (1949) protected white as well as colored voters from ballot box stuffing under the Fourteenth Amendment. No racial discrimination was involved here.

Snowden v. *Hughes*, 32 U. S. 1, 86 L. Ed. 447 (1943) does not apply to the present case. This case involved the right to become a candidate for state office. The Court held this not to be a federal question. The Attorney General has quoted language from this case to the effect that the right to run for office in a state election was not a privilege and immunity of the Fourteenth Amendment. This certainly could not be twisted to mean that the Civil Rights Act which talks about privileges and immunities, does not cover a voting problem. It is submitted that *Snowden* v. *Hughes* does not in any way apply to the present case.

The other cases following *Snowden* v. *Hughes*, *supra*, come down to the same things. None of them involve the right to vote. All involve rights which have been properly held not to be federally protected. In *Charters* v. *Shaffer et al.*, 181 F. 2d 764 CCA 3d (1950) a policeman sought to be reinstated. In *Earle C. Anthony, Inc.* v. *Morrison et al.*, 83 F. Supp. 494 S. D. Cal. (1948) Plaintiff sought redress because the right to broadcast a murder trial had been granted to defendant.

(c) Reapportionment for State elections is a Federal question.

Since the case of *Smiley* v. *Holm*, 285 U. S. 355, 76 L. Ed. 795 (1932) reapportionment of State Legislative Districts for both Federal and State Elections has been uniformly held to be a Federal question. *Koenig* v. *Flynn*, 285 U. S. 375, 76 L. Ed. 805 (1932); *Carroll* v. *Becker*, 285 U. S. 380, 76 L. Ed. 807 (1932); *Wood* v. *Broom*, 287 U. S. 1, 77 L. Ed. 131 (1932); *Colegrove* v. *Green*, 328 U. S. 549, 90 L. Ed. 1432 (1945); *MacDougall* v. *Green*, 335 U. S. 281, 93 L. Ed. 3 (1947); *South* v. *Peters*, 339 U. S. 276, 94 L. Ed. 834 (1950). While the Federal Courts have not uniformly granted relief in all of these cases, there has been no question but that they had the power to do so and were the proper Court in which to raise the question. In every one of these cases State as well as Federal Elections were involved.

The right to vote in Federal or State elections is a constitutional right protected by the Federal Courts.

Smith v. *Allwright*, 321 U. S. 649, 88 L. Ed. 987 (1944); *Nixon* v. *Herndon*, 273 U. S. 536, 71 L. Ed. 759 (1927).

That the voting right will be protected in State as well as Federal elections by Federal Courts was decided and discussed in two cases. *Chapman* v. *King*, 154 F. 2d 460 (CCA 5th, 1946); *Rice* v. *Elmore*, 165 F. 2d 387 (CCA 4th, 1947).

(d) Exhaustion of State Remedy is not required.

There is a Federal doctrine requiring exhaustion of State remedies in (1) cases where an administrative remedy has been provided; *Prentiss* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. Ed. 150 (1908); (2) State criminal cases involving questions of criminal procedure; *Ex Parte Hawk*, 321 U. S. 114; 64 Sup. Ct. 448 (1944); *Cooper* v. *Hutchinson*, 88 F. Sup. 774, 184 F. 2d 119 (CCA 3d, 1950); (3) cases involving a State statute which have not been construed, and which a State Court could construe so as to

make it constitutional. *Alabama Fed. of Labor* v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725 (1945).

This rule exists because the Federal Court does not wish to interfere with State Judicial or administrative procedure.

It has never been a rule that where there is Federal Jurisdiction in a de novo case that the plaintiff must use the State Courts first, *Lane* v. *Wilson*, 307 U. S. 268, page 274, 83 L. Ed. 1281 (1939). Here the court said (page 274) "Barring only exceptional circumstances or explicit statutory requirements, resort to a federal court may be had without first exhausting the judicial remedies of the State Court."

In this case the State proceeding would be on the same level with the Federal. Plaintiffs have no administrative remedy. There is no possibility that a state Court could construe the Constitution of Pennsylvania or a Pennsylvania statute so that the present districting would be valid.

The exhaustion argument has been raised in cases claiming infringement of the right to vote, and it has failed. *Mitchell* v. *Wright*, 154 F. 2d 1924 CCA 5th (1946). There is adequate authority that discrimination against the voting right is a Federal question requiring no state action. This applies to State as well as Federal elections. *Lane* v. *Wilson (supra)*.

In *MacDougall* v. *Green*, 335 U. S. 281, 93 L. Ed. 3 (1947), a case involving nominations for office as affected by the failure to redistrict legislative districts, no state remedy was pursued. This was argued (paper book, Appellant's Brief, page 18), and the Supreme Court took jurisdiction to decide the case on the merits.

B. This Case Presents a Justiciable Controversy

(1) Existing authority does not bar this Court from taking Jurisdiction.

Although there had been two prior attempts to remedy a reapportionment situation in the Federal Courts, *Everglades Drainage League* v. *Napoleon*, 253 Fed. 246 (S.D. Fla. 1918); *Keogh* v. *Neely*, 50 F. 2d 685 (CCA 7th, 1931) it was not until 1932 that the problem reached the Supreme Court. *Smiley* v. *Holm*, 285 U. S. 355, 76 L. Ed. 795 (1932); *Koenig* v. *Flynn*, 285 U. S. 375, 76 L. Ed. 805 (1932); *Carroll* v. *Becker*, 285 U. S. 380, 76 L. Ed. 807 (1932).

In *Smiley* v. *Holm*, the Supreme Court held that a state could properly give its governor power to approve a reapportionment bill, and since he had not done so, the Court declared the bill invalid and thereby forced an election at large. The problem of remedy was fully argued, but the Court voiced no fear about the evil effects of taking jurisdiction, and nothing disastrous ever happened. This case covered both Federal and State elections.

In *Wood* v. *Broom*, 287 U. S. 1, 77 L. Ed. 131 (1932) the first fear about the effects of jurisdiction appeared where some judges thought there was want of equity. However, this case dealt with Federal elections and turned on the invalidity of a congressional statute.

Colegrove v. *Green*, 328 U. S. 549, 90 L. Ed. 1432 (1945) was the next attempt to obtain judicial relief from a pernicious apportionment situation in Illinois.

Here three persons who were qualified voters in congressional districts of Illinois, which have much larger populations than other congressional districts of that State, brought suit in a Federal District Court in Illinois under the Declaratory Judgment Act, to restrain officers of the State from arranging for an election, in which members of Congress were to be chosen, pursuant to provisions of an Illinois law of 1901 governing congressional districts. The complaint alleges that, by reason of later changes in the

population, the districts lacked compactness of territory and approximate equality of population, and prayed a decree, declaring the provisions of the State law invalid and in violation of various provisions of the Federal Constitution &c.

The lower Court, 64 F. Supp. 632, although stating in positive terms that the denial or impairment of a citizen's right to choose a representative on terms of equality with other qualified voters in other districts is prohibited by the Constitution, yet felt bound by the case of *Wood* v. *Broom*, 287 U. S. 1, to reach a conclusion contrary to which it would have reached but for that decision.

The U. S. Supreme Court affirmed the Lower Court, in an opinion written by Mr. Justice Frankfurter, concurred in by Mr. Justice Reed, and Mr. Justice Burton. Mr. Justice Rutledge concurred in result, and Mr. Justice Black dissented, and Mr. Justice Douglas and Mr. Justice Murphy joined in the dissent.

Mr. Justice Frankfurter said that the case was decided properly on the authority of *Wood* v. *Broom*: that the Constitution had conferred upon Congress exclusive authority to secure fair representation by the State in the popular house, and to sustain the action would cut very deep into the very being of Congress, and the Courts ought not to enter this political thicket.

Mr. Justice Rutledge concurred in the result because he found a tenable alternative ground for disposition of the controversy, i.e. Congress had full power to act. He said:

"Assuming that that decision (referring to *Smiley* v. *Holm*) is to stand, I think with Mr. Justice Black, that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable."

Mr. Justice Black, in his dissenting opinion, said page 568:

"The assertion here is that the right to have their vote counted is abridged unless the vote is given approximately equal weight to that of other citizens. It is my judgment that the District Court had jurisdiction; that the complaint presented a justiciable case and controversy; and appellants had standing to sue, since the facts alleged show that they have been injured as individuals. Unless previous decisions of this Court are to be overruled, the suit is not one against the State but against state officials as individuals. The Complaint attacked the 1901 Apportionment Act as unconstitutional and alleged facts indicating the Act denied appellants the full right to vote and the equal protection of the law. These allegations had not been denied. Under these circumstances, and since there is no adequate legal remedy for depriving a citizen of his right to vote, equity can and should grant relief. * * * (page 569). The equal protection clause of the Fourteenth Amendment forbids such discrimination. * * * Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit. * * * (page 572). Under these circumstances it is the Court's duty to invalidate the State Law. * * * (page 573). It is true that voting is a part of elections and that elections are political. But this Court said in *Nixon* v. *Herndon*, it is a mere 'play upon words' to refer to a controversy as this as 'political' in the sense that courts have nothing to do with protecting and vindicating the right of the voter to cast an effective ballot. The *classic* case among myriads of others, refutes the contention that Courts are impotent in connection with evasions of all 'political rights' *Wood* v. *Broom*, 287 U. S. 1 does not preclude the granting of equitable relief in this case. There the Court simply held that the State Apportionment

Act did not violate the Congressional Reapportionment Act of 1929 &c. * * * The Court expressly reserved the question of 'the right of the complainant to relief in equity. * * * In this case no supervision over elections is asked for. What is asked for is that this Court do exactly what it did in Smiley vs. Holm. It is asked to declare a state apportionment bill invalid and to enjoin state officials from enforcing it. * * * It has always been the rule that where a federally protected right has been invaded the federal courts will provide the remedy to rectify the wrong done. Federal Courts have not hesitated to exercise the equity power in cases involving deprivation of property and liberty. *Export Young, Hague vs. C.I.O.*, 307 U. S. 496. There is no reason why they should do so where the case involves the right to choose representatives that make the laws affecting liberty and property * * *"

That a majority of the court felt that some reapportionment case might be justiciable was pointed out a year later in *Cook* v. *Forston*, 329 U. S. 657, 91 L. Ed. 596 (1946). Here it was sought to invalidate Georgia's County unit system for selecting candidates for election to public office on the ground of deprivation of equal protection of the laws in respect to the right of suffrage contrary to the provisions of the Fourteenth Amendment. Mr. Justice Rutledge said "Obviously the appeals present questions related closely to the issues in *Colegrove* v. *Green*, but in my opinion (page 678) not necessarily determined by that decision. * * * The issues, whether of jurisdiction, of discretion in exercising it, or of substantive right, are obviously important. *In my judgment they have not been conclusively adjudicated by prior decisions of the Court.* I therefore think they should not be determined until full hearing and consideration after argument.

MacDougall v. *Green*, 335 U. S. 281, 93 L. Ed. 3 (1947) showed that the Supreme Court would examine the merits of a reapportionment problem. To nominate candidates for Federal and State elections in Illinois a political party had to get a certain number of signatures from each legislative district in the State. Because of the disproportion in the districts the plaintiff party was unable to get sufficient signatures. The Supreme Court assumed jurisdiction of the case and decided on the merits that it was allowable State policy to so require signatures on nominating petitions.

South v. *Peters*, 339 U. S. 276, 94 L. Ed. 834 (1950) did not clarify the law. This was a per curiam opinion rejecting jurisdiction on the basis of *Colegrove* v. *Green (supra)* and *MacDougall* v. *Green (supra)*. Thus, it is unclear whether the court refused jurisdiction, or took jurisdiction and decided on the merits.

Inspection of the lower court's opinion in *South* v. *Peters*, 339 U. S. 276, 94 L. Ed. 834 (1950) substantiates that this case did not finally adjudicate all reapportionment cases. The majority opinion held that it was allowable state policy to fix the election sub-divisions by the county-unit method.

Furthermore, Mr. Justice Douglas, in his dissenting opinion said the right to vote "includes the right to have the vote counted at full value without dilution or discount. *U. S.* v. *Saylor*, 322 U. S. 385. The federally protected right suffers substantial dilution in this case. * * * (page 280) Plaintiffs sue as individuals to enforce rights political in origin and relating to political action. But as Mr. Justice Holmes said of some arguments in *Nixon* v. *Herndon*, it is 'little more than a play upon words' to call it a political suit and therefore a non-justiciable one. The rights they seek to enforce are personal and individual. * * *"

These three cases leave the law in this state i. e. the Federal Courts are wary because of the political question

doctrine of taking jurisdiction in a reapportionment case, but have left the door open for a proper set of facts.

(2) Enforcement of voting rights is not a political question.

The political question doctrine in the reapportionment cases has had an odd development. Generally, in other fields, it has been invoked before any court had attempted to decide a case in that field. *Finkelstein, Judicial, Self-Limitation* (*supra*). Thus, no one has ever known whether the courts have been wise or only timid in denying jurisdiction because of this rule. However, in the reapportionment field, the Supreme Court did take jurisdiction, and completely disposed of three cases, *Smiley* v. *Holm*, 285 U. S. 355, 76 L. Ed. 795 (1932); *Koenig* v. *Flynn*, 285 U. S. 375, 76 L. Ed. 805 (1932); *Carroll* v. *Becker*, 285 U. S. 380, 76 L. Ed. 807 (1932). No bad results occurred from these decisions. *Colegrove* v. *Green*, 328 U. S. 549, 90 L. Ed. 1432 (1945), page 575, dissent by Justice Black). With this background the fears of the Supreme Court in *Colegrove* v. *Green* (*supra*), seem groundless.

The political question objection blocked negroes from enforcing the right to vote in 1903. *Giles* v. *Harris*, 189 U. S. 475, 47 L. Ed. 909 (1903). But twenty-four years later another negro won the initial victory which started the voting right cases; *Nixon* v. *Herndon*, 273 U. S. 536, 71 L. Ed. 759 (1927) and here the political question doctrine was called a play on words.

When a study is made of the battle by the Federal Courts and the Southern State legislatures since *Nixon* v. *Herndon* (*supra*), Justice Frankfurter's statement in *Colegrove* v. *Green* (*supra at page 556*) that the court should not enter a political thicket appears startling.

(3) *Colegrove* v. *Green* is a different situation from the one presented here.

The important distinction between *Colegrove* v. *Green* (*supra*) and the present case is that here the plaintiffs are dealing with a State Legislature alone, whereas in the *Colegrove* case both Congress and the Illinois General Assembly were in the picture.

In *Colegrove* v. *Green* (*supra*) Justice Frankfurter pointed out that Congress has the power to control its own elections. This was the principal reason why the Supreme Court did not interfere. But note that in *Colegrove* v. *Green* Congress was not the Villain. The body which would not fairly apportion was the Illinois Legislature. Congress at that time had its own legislation in effect which tended to induce reapportionment. The Reapportionment Act of June 18, 1929, 46 Stat. 26, as amended 54 Stat. 162, 55 Stat. 761, 2 U. S. C. A. Sec. 2a. The Supreme Court felt it was on an equal plane with Congress and should not interfere where Congress had been regulating.

In this case the malefactor is also the State Legislature. Since the matter involves state elections, Congress has no interest or power in regulating this. Therefore, the only legislative body the Federal Courts can be concerned with here is the State General Assembly. It is certainly impossible to apply the Colegrove rationale here; i. e., that the Federal Courts should not interfere where the State Legislature has the capacity to regulate. In this case the legislature's refusal, or lack of desire, to act is the nub of the complaint.

Although Justice Frankfurter in *Colegrove* v. *Green* talked of the people turning to the legislature for remedy, it is vital to note that he left those plaintiffs both Congress and the State assembly to which they could turn. Here the plaintiffs have only the General Assembly of Pennsylvania to grant relief if the court should deny it. That body has shown by its conduct in the past twenty years that only the rarest sort of miracle will produce a reapportionment bill.

Plaintiffs cannot understand why sensitive relations between the National and State Governments have anything to do with this problem. If the plaintiffs have a right to an equal vote, they should be able to employ the Civil Rights Act, 17 Stat. 13, 8 U. S. C. A. Sec. 43 to enforce the right.

Plaintiffs concede that if the Federal Courts did take jurisdiction there would be a great hue and cry from the Pennsylvania General Assembly. The legislature, obviously, hasn't desired to reapportion, and for the past twenty years has diligently avoided performing this duty. However, this does not change plaintiffs' rights nor should it affect their remedy.

4. Remedy.

Naming this problem a political question hides a judicial concern about the practicability of a remedy. First, it should be recognized that except through judicial action the plaintiffs have no other way of enforcing their rights. Disproportion of representation is a self-perpetuating evil. The legislators from the smaller districts naturally oppose any attempt to have their advantage curtailed. The legislators from the larger districts are unable to force through a reapportionment bill because they don't have sufficient numerical strength. Furthermore, as the population increases the relative power of the smaller and larger districts increases in disproportion.

5. Possible remedies.

(i) Election at large.

If the Court should declare Pa. Laws, 1921, P. L. 4445, 449, 25 P. S. Sec. 2201, 2210 as amended unconstitutional and invalid, the effect would be to require the elections for the State General Assembly to be at large. An election at large is a judicial creation. *Smiley* v. *Holm*, 285 U. S. 375, 76 L. Ed. 795 (1932). In that case, involving the election of Congressmen and State Officials, there was no Federal law calling for an election at large in the circumstances pre-

sented by that case. The Act of August 11, 1911, 37 Stat. 14, 2 U. S. C. A. Sec. 4 (Election at large only when State entitled to extra representatives). The majority of the court held that since the Congressmen were to be elected by the People (*Article I, Section 2, United States Constitution*), an election at large was proper. The Pennsylvania Constitution has provisions which require the same construction. Constitution of the Commonwealth of Pennsylvania, *Article II, Sec. 2* (members of the General Assembly shall be chosen at the general elections); *Article VIII, Sec. 1* (power to vote in people); *Article I, Secs. 2, 5* (power of government in the people).

In Colegrove v. *Green*, 328 U. S. 549, 90 L. Ed. 1932 (1945) the majority were dubious of the remedy of an election at large. It is to be noted that this worry was highlighted by the power of Congress to control how its members were to be elected (*supra* at page 553). This concern seems unjustified in view of the experience of *Smiley* v. *Holm* (*supra*); *Carroll* v. *Becker*, 285 U. S. 380, 76 L. Ed. 807 (1932); and *Koenig* v. *Flynn*, 285 U. S. 375, 76 L. Ed. 805 (1932). Furthermore, there is no shortness of time here since the next election affecting the General Assembly will not occur until 1952. *Pa. Laws, 1937 P. L. 1333, Art. VI, Sec. 601; 25 P. S. Sec. 2751.*

For another reason, which oddly ties in with the negligence of the Pennsylvania legislature, an election at large is not such a disaster. Because of the 1950 census Pennsylvania is entitled to three less U. S. Congressmen than it now has. Unless Pennsylvania is reapportioned it will have to elect its Congressmen at large, 54 Stat. 162, 2 U. S. C. A. sec. 2a1. To date the General Assembly has not reapportioned as to Congressmen. The legislators themselves cannot be too concerned with the terrors of an election at large.

(ii) Damages.

While the Declaratory Judgment is generally classified as an equitable remedy, it clearly has its roots in the law. *Borchard, Declaratory Judgments,* 2d Ed. p. 137 (1934). Therefore, injunctive procedure is not the only possible relief afforded by the Declaratory Judgment. Relief by award of damages is entirely proper. *Stephenson* v. *Equitable Life Assurance Soc.,* 93 F. (2d) 406 (CCA 4th 1937); *Beatty* v. *Chicago, B. & Q. Ry. Co.,* 49 Wyo. 22, 52 P. (2d) 404 (1935); *Borchard, Declaratory Judgments,* 2d Ed. p. 440 (1934).

This is peculiarly important in this case. The Texas voting cases initially raised a distinction between equitable relief and damages in regard to the political question doctrine. Cf. *Giles* v. *Harris,* 189 U. S. 475, 47 L. Ed. 909 (1903); and *Nixon* v. *Herndon,* 273 U. S. 536, 71 L. Ed. 759 (1927); but see *Dean* v. *Thomas,* 93 F. Sup. 129 (Ed. La. 1950). *Terry* v. *Adams,* 90 F. Sup. 595 (S. D. Texas, 1950). Although an equitable remedy seems more practical (Note 62 Harv. L. Rev. 659 (1948)), the damage distinction appeared again in *Colegrove* v. *Green (supra* at page 552). Justice Frankfurter used it to escape the effect of the Texas Voting cases analogy, and left open the possibility that an action for damages in this matter might succeed. If the Court was serious about this procedural matter, as was Justice Holmes in *Giles* v. *Harris (supra)* and *Nixon* v. *Herndon (supra),* an award of damages should solve the remedy problem and permit the court to take jurisdiction.

Plaintiffs, therefore, contend that the Special District Court should not have dismissed their suit for want of equity.

Respectfully submitted,

S. Lloyd Moore, of
Moore, Panfil & James,
Attorneys for Plaintiffs.

EXHIBIT "A"

Article III, section 18, Constitution of the Commonwealth of Pennsylvania

Sec. 18. Legislative Apportionment. The General Assembly at its first session after the adoption of this Constitution, and immediately after each United States decennial census, shall apportion the State into senatorial and representative districts agreeably to the provisions of the two next preceding sections.

EXHIBIT "B"

Article III, sections 16 and 17, Constitution of the Commonwealth of Pennsylvania

Sec. 16. Senatorial Districts. Ratio. The State shall be divided into fifty senatorial districts of compact and contiguous territory as nearly equal in population as may be, and each district shall be entitled to elect one Senator. Each county containing one or more ratios of population shall be entitled to one Senator for each ratio and to an additional Senator for a surplus of population exceeding three-fifths of a ratio, but no county shall form a separate district unless it shall contain four-fifths of a ratio, except where the adjoining counties are each entitled to one or more Senators, when such county may be assigned a Senator on less than four-fifths and exceeding one-half of a ratio; and no county shall be divided unless entitled to two or more Senators. No city or county shall be entitled to separate representation exceeding one-sixth of the whole number of Senators. No ward, borough or township shall be divided in the formation of a district. The senatorial ratio shall be ascertained by dividing the whole population of the State by the number fifty.

Sec. 17. Representative Districts. The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the State as ascertained by the most recent United States census by two hundred. Every county containing less than five ratios shall have one representative for every

full ratio, and an additional representative when the surplus exceeds half a ratio, but each county shall have at least one representative. Every county containing five ratios or more shall have one representative for every full ratio. Every city containing a population equal to a ratio shall elect separately its proportion of the representatives allotted to the county in which it is located. Every city entitled to more than four representatives and every county having over one hundred thousand inhabitants shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population, but no district shall elect more than four representatives.

EXHIBIT "C"

Final Order of District Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 12,124
(Filed September 22, 1951)

ROBERT H. REMMEY, JR., CLARENCE E. BERTOLET, FRANK BRUCKERI, *Plaintiffs*,

v.

GENE D. SMITH, Secretary of the Commonwealth of Pennsylvania and ANTHONY J. DESILVESTRO, et al., *Defendants*

ORDER

Present: BIGGS, *Circuit Judge*, and BARD and CLARY, *District Judges*

And Now, to wit, this 22nd day of September, 1951, it is Ordered that the above entitled suit be and the same hereby is dismissed for want of equity.

For the Court,

(S.) BIGGS,
United States Circuit Judge.

EXHIBIT "D"

Letter from Hon. John A. Fine

COMMONWEALTH OF PENNSYLVANIA

Governor's Office

Harrisburg

February 14, 1951.

John S. Fine
Governor

S. Lloyd Moore, Esquire
1306-16 Lincoln-Liberty Building,
Broad and Chestnut Streets,
Philadelphia 7, Pennsylvania.

DEAR MR. MOORE:

I understand that there will be a bill introduced reapportioning the State Legislative Districts. As you know both parties are committed to effect the reapportioning of Congressional, Senatorial and Legislative Districts.

With best wishes,

Sincerely,

(S.) JOHN S. FINE.

EXHIBIT "E"

Opinion by Judge Biggs

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 12,124
(Filed September 22, 1951)

ROBERT H. REMMEY, JR., CLARENCE E. BERTOLET, FRANK BRUCKERL, *Plaintiffs*,

v.

GENE D. SMITH, Secretary of the Commonwealth of Pennsylvania and ANTHONY J. DESILVESTRO, et al., *Defendants*

Before BIGGS, *Circuit Judge*, and BARD and CLARY, *District Judges*

OPINION

By BIGGS, *Circuit Judge*.

The plaintiffs, citizens of the United States and of the Commonwealth of Pennsylvania, residents and registered voters of the City and County of Philadelphia, qualified to vote in the 17th Representative District and 8th Senatorial District thereof for Members of the General Assembly of the Commonwealth of Pennsylvania, have sued the Secretary of the Commonwealth and the duly elected Members of the 1951 General Assembly of the Commonwealth. The plaintiffs seek, among other things, to have this court declare unconstitutional the Pennsylvania statutes of May 10, 1921, P.L. 449 and P.L. 455, as amended, 25 P.S. Pa. §§ 2201 *et seq.* (Supp. 1950),[1] referred to hereinafter as

[1] Though the plaintiffs refer only to P. L. 449 and P. L. 455, in their Complaint, we assume for the purposes of this opinion, that they seek to have not only the specific statutes, to which they have referred, declared unconstitutional but also the Acts amendatory or supplemental thereto. The pertinent statutes are: Act of May 10, 1921, P. L. 449, as

the "Apportionment Act of 1921", to compel the Members of the General Assembly to pass a new apportionment act which will reflect population changes in the Commonwealth, and to enjoin the Secretary of the Commonwealth from performing the functions mandatorily imposed upon him in connection with holding of elections for Members of the General Assembly until a proper and adequate apportionment law has been passed.[2]

The Complaint alleges that under the present Constitution of Pennsylvania, that of 1874, after each decennial United States census has been completed the General Assembly of Pennsylvania is required immediately to apportion the Commonwealth into representative and senatorial districts;[3] that the 1950 United States decennial census has been completed; that the representation of the plaintiffs in the General Assembly has become grossly disproportionate; that for the last two decades, viz., from 1931 until the date of the filing of the instant Complaint on April 11, 1951 that disproportion has grown so great that they and their fellow citizens in the wards and districts of Philadelphia designated have in effect been deprived of suffrage. The plaintiffs cite figures which show that in the Ninth Representative District (population 8,767), a vote cast for a representative is over a score of times more effective than a vote cast in the Seventeenth Representative District (population 257,373) where the plaintiffs reside. The Complaint also asserts that since 1931, at every regular session of the General Assembly, attempts have been made to compel that body to reapportion the state

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amended by Act of April 26, 1923, P.L. 106 (No. 80), Act of May 10, 1921, P.L. 455, as amended by Act of April 26, 1923, P.L. 98, Act of May 8, 1923, P.L. 172, Act of May 15, 1923, P.L. 206, Act of June 29, 1923; P.L. 942, and Act of April 30, 1929, P.L. 877, Purdon's Pa. Stat. Ann. Tit. 25 §§ 2201 *et seq.* (Supp. 1950).

[2] Since the suit is one to declare a state statute unconstitutional a three-judge district court was convened pursuant to Sections 2281 and 2284, Title 28, USC.

[3] See the Constitution of Pennsylvania, Article 2, Section 18 which provides: "The General Assembly . . . *immediately* after each United States decennial census shall apportion the state into senatorial and representative districts . . ." (Emphasis added).

senatorial and representative districts in accordance with the Constitution of Pennsylvania and that these efforts have met with no success,[4] that since the beginning of the 1951 regular session of the General Assembly of the Commonwealth of Pennsylvania, despite the fact that both major political parties publicly pledged themselves to reapportionment, no bill relating to reapportionment has passed either House.

The Complaint also points out that Article VII, Section 1, of the Constitution of the Commonwealth of Pennsylvania requires Senators and Representatives of the General Assembly of the Commonwealth to make oath that they will discharge the duties of their office with fidelity and provides also that any individual who shall be convicted of violation of this oath shall be deemed guilty of perjury and shall be disqualified forever from holding any office of trust or profit within the Commonwealth.

The plaintiffs assert that they have been deprived of constitutional rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and freedom of elections as guaranteed by Article I, Section 5,[5] of the Constitution of the Commonwealth of Pennsylvania and that their right to vote as guaranteed by Article VIII, Section 1,[6] of the Constitution of Pennsylvania has been "Decimated".

A motion to dismiss has been filed by all the defendants based on the ground, among others, that this court is with-

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[4] In a leading article in the University of Pittsburgh Law Review, Vol. 12, No. 12, p. 230, it is stated that since 1921 52 bills dealing with the problem of apportionment have been introduced in the General Assembly. See also the "Chronology of Legislative Attempts to Change Apportionment Legislation Now in Force", an appendix to the article referred to.

[5] Article I, Section 5, provides in pertinent part: "Elections shall be free and equal . . ."

[6] Article VIII, Section 1, of the Constitution of Pennsylvania, in pertinent part, provides:

"Every citizen twenty-one years of age (possessing qualifications as designated) . . . shall be entitled to vote at all elections, subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact."

out jurisdiction or the power to adjudicate the controversy because the subject matter of the suit lies within the ambit of the powers peculiarly reserved to the States under the Constitution of the United States.

We have set out the allegations of the complaint at such length because we think that the plaintiffs are entitled to have their case stated fully. Without receiving evidence or making specific findings of fact we are aware, as is almost everyone in Philadelphia, that what the plaintiffs assert in their Complaint is notoriously true. The practical disenfranchisement of qualified electors in certain of the election districts in Philadelphia County is a matter of common knowledge. The last effective Apportionment Act of Pennsylvania, that which the plaintiffs are seeking now to have declared unconstitutional, is the act of 1921. See note 1, *supra*. Two apportionment acts were passed by the General Assembly in 1937, Acts of June 30, 1937, P.L. 2454 and P.L. 2443,[7] but these were declared unconstitutional by the Court of Common Pleas of Dauphin County. See Shoemaker v. Com., *ex rel.* Lawrence, 45 Dauphin County Reports 111, and Lyme et al. vs. Lawrence, id., 322. No general Apportionment Act has been passed by the General Assembly since that of 1937. As we have said, the Constitution of the Commonwealth provides that "Elections shall be free and equal . . ." and to achieve this end the Constitution itself contains provisions for the apportionment for the election of Senators[8] and Reapportionments shall be made.[10]

The blunt fact is that past General Assemblies of Pennsylvania have been derelict in the duty specifically imposed on them by the Constitution of Pennsylvania in failing to pass reapportionment acts as required by the express mandate of the Pennsylvania Constitution. That they have

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[7] See P.S. Pa. Ann., Tit. 25, §§ 2201 *et seq.* (1938).

[8] Constitution of Pennsylvania, Article II, § 16.

resentatives,[9] and for the times and periods when such

[9] Id. § 17.

[10] Id. § 18.

failed to do so must be deemed to be all the more extraordinary in the temper of this time and age when so much emphasis has been placed upon the representative form of government and upon the democratic process. The remedy of the substantially disenfranchised elector, however, lies, at least primarily, in the General Assembly and in the Courts of Pennsylvania.

Even when the selection of the Representatives in the national Congress has been the subject of the litigation and a State has failed to adopt a mode of selection of Representatives in accord with federal reapportionment acts, the Supreme Court of the United States has held that the issue presented is one "of a peculiarly political nature and therefore not meet for judicial determination," and that the courts of equity, at least those of the federal system, should not enter this field. See Colegrove v. Green, 328 U.S. 549, 552. Action by this court is, therefore, circumscribed.[11] See South v. Peters, 339 U.S. 276; MacDougall v. Green, 335 U.S. 281, and Wood v. Broom, 287 U.S. 1, 8. Cf. Snowden v. Hughes, 321 U.S. 1 and Koenig v. Flynn, 285 U.S. 375. *A fortiori* if a court of the United States should not compel a State Legislature to effect a reapportionment relative to the national representative elective system, it should not do so in respect to an apportionment system whereby Representatives in State legislatures are to be chosen. An action such as

[11] The question of jurisdiction in cases involving selections of Representatives in Congress has not as yet, in our opinion, been adjudicated by the Supreme Court. In Colegrove v. Green, 328 U.S. 549, 552, 553, 556, Mr. Justice Frankfurter said that these "demands on judicial power . . . cannot be met by verbal fencing about 'jurisdiction'.", and that "At best . . . (the Supreme Court) could only declare the existing electoral system invalid.", and that "the Constitution has many demands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.". The language employed would seem to indicate that the questions presented relate to the exercise of judicial power rather than to the possession of the power to adjudicate.

that at bar may strike at the very heart of our dual system of government under which the United States and the States must remain sovereign in their spheres. But a suit based on the Third Civil Rights Act, 17 Stat. 13, 8 U.S.C.A. § 43, as well as upon the Fourteenth Amendment, may present novel questions, not yet decided. We do not reach them at this time for the reason hereinafter stated.

The determination which the plaintiffs would have us make lies in that extremely sensitive field, the relation of the powers of the National Government to those of the States. Here, of all places, a federal court should tread warily and with great circumspection and should forego any action where relief may be furnished by the State. This court should not intervene where an apparent, but untried, remedy may lie in the Courts of the Commonwealth of Pennsylvania. Those Courts may declare the present operation of the Apportionment Act of 1921 to be unconstitutional under the Pennsylvania Constitution. Cf. Shoemaker v. Commissioner *ex rel.* Lawrence and Lyme v. Lawrence, *supra;* Commonwealth *ex rel.* Biddle v. Crow, 218 Pa. 234, 67 A. 355; Attorney General v. Suffolk County Apportionment Commissioners, 224 Mass. 598, 113 N.E. 581, and State ex rel. Attorney General v. Cunningham, 81 Wis. 440 51 N.W. 724. Moreover, and this we deem to be a most cogent circumstance, the 1951 General Assembly of the Commonwealth of Pennsylvania is in session. This is the first General Assembly convened following the United States decennial census of 1950. The 1951 General Assembly has the opportunity to act in respect to this most important matter and, if it does, may pass a reapportionment act which will meet every constitutional requirement. Under these circumstances action by this court at this time would, at best, be premature.

Expressly we do not pass upon the question of our jurisdiction to adjudicate the questions presented. Deeming the instant suit to be prematurely brought, we will dismiss it for want of equity.

For the Court,

(S.) Biggs,
U. S. Circuit Judge.

Dated: September 22, 1951.

EXHIBIT "F"

Concurring Opinion by Judge Bard

I concur that the suit should be dismissed.

The opinion of Chief Judge Biggs would dismiss this suit as premature on the grounds that plaintiffs failed to exhaust their state remedies and that the 1951 Pennsylvania General Assembly may pass a new apportionment act.

I agree. But there are additional reasons warranting dismissal that should be stated at this time so that plaintiffs are not misled into believing they can return to this Court and obtain relief at some future date.

The Civil Rights Acts, upon which this suit is based, provide redress for violations of federal rights. The crucial question is what *federal* right is violated by the Pennsylvania legislature's failure to reapportion the *State* legislative districts every ten years in accordance with the *state* constitution.

The free and untrammeled right or privilege of suffrage is not given by any Articles of or Amendments to the Federal Constitution. The Constitution guarantees a republican form of government only to the extent that the citizens of the various states are to select their own form of government, as they did in the original thirteen states, and to the extent that the states are duty bound to provide a government "by the people". This, however, is the full limit of national control of state affairs, and the state assumes

absolute control thereafter. U. S. Const. Art. IV, § 4; Minor v. Happersett, 21 Wall. 162, 170-176; Keogh v. Neely, 50 F. 2d 685.

The Fourteenth Amendment did not add any right to vote; it only guaranteed additional protection to the rights and privileges a citizen already had. Minor v. Happersett, supra.

Appropriate here are the words of Mr. Justice Peckham in Pope v. Williams, 193 U. S. 621, at page 632: "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. *In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper,* provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." (Emphasis added.)

What types of discrimination in state elections are forbidden by federal law? Section 1 of the Fifteenth Amendment and Section 31 of Title 8, U. S. Code prohibit discrimination on the ground of race, color or previous condition of servitude. The Nineteenth Amendment bans discrimination on account of sex.[12] To interpolate into these provisions the right that an individual's vote in an election for state offices should not be diluted by unequal apportionment but should be equal in weight to each other vote cast in the state would be legislative action by judicial pronouncement.

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[12] Section 2 of the Fourteenth Amendment reduces proportionately a state's representation in Congress if the right of male inhabitants to vote for members of the state legislature is denied or abridged in any way. But, as was pointed out in Chief Judge Biggs' opinion this has been determined by the United States Supreme Court in recent opinions to be a "political question" and not a "justiciable issue". In addition to the cases cited in Chief Judge Biggs' opinion, see also Saunders v. Wilkins, 152 F. 2d 235.

Accordingly, I cannot find the necessary violation of a federal right, and would dismiss this action for this reason.

Plaintiffs have great merit in their cause. It is all too true that the state legislators sworn to uphold the Constitution have been flagrant in their violation of the Pennsylvania Constitutional mandate to re-apportion the state every ten years, and that the present apportionment system is a gross example of gerrymandering at its worst. The legislative history of recent decades and the protracted and dilatory tactics of the current legislative session indicate that the state legislators will probably continue to be inexcusably derelict in this important matter. But plaintiffs' remedy lies in the state courts because a state right, not a federal right, is being violated.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 503

ROBERT H. REMMEY, JR., CLARENCE E. BERTOLET, FRANK BRUCKERL,

Appellants,

vs.

GENE D. SMITH, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA AND ANTHONY J. DESILVESTRO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

H. F. STAMBAUGH,
Special Counsel;

ROBERT M. MOUNTENAY,
Deputy Attorney General;

ROBERT E. WOODSIDE,
Attorney General,

Attorneys for Appellees.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION

This case was heard in the court below upon the plaintiffs' complaint under the Declaratory Judgment Act (63 Stat. 105, 28 U. S. C. A. Sec. 2201, 2202), and the defendants' motion to dismiss.

The averments of fact in the complaint were as follows:

Plaintiffs are citizens of the United States and of the Commonwealth of Pennsylvania, and are residents and registered voters of the City and County of Philadelphia, and are qualified to vote in the 17th Representative District

and the 8th Senatorial District for Members of the General Assembly of the Commonwealth of Pennsylvania (Par. 5).

The defendant, Gene D. Smith, is the Secretary of the Commonwealth of Pennsylvania, and the other defendants are all of the elected Members of the 1951 General Assembly of the Commonwealth of Pennsylvania (par. 4).

Article II, Section 18 of the Pennsylvania Constitution of 1874 provides that the General Assembly shall apportion the State into Representative and Senatorial Districts after each decennial census of the United States has been completed (par. 8).

The last apportionment by the General Assembly of Pennsylvania was made in 1921 (Par. 13).

The population of the 8th Senatorial District in 1920 was 284,626, or 15.6% of the population of the City of Philadelphia; the population of this district in 1950 was 441,326, or 21.5% of the population of the city (par. 11).

The population of the 17th Representative District in 1920 was 74,193, or 4.1% of the population of the city; the population of the same district in 1950 was 257,373, or 12.5% of the population of the city (par. 11).

In 1950 the 3rd Senatorial District of the City of Philadelphia had a population of 78,314 and the 8th Senatorial District had a population of 441,326, or 5.6 times that of a 3rd Senatorial District.

In 1950 the population of the 9th Representative District was 87,667 and that of the 17th Representative District was 257,373, or 29.3 times that of the 9th Representative District (par. 12).

Since the beginning of the 1951 session of the General Assembly both political parties have publicly committed themselves to reapportion the legislative districts of the Commonwealth and reapportionment bills have been introduced in the House of Representatives for the reapportion-

ment of Representative Districts and have not been reported out of committee (par. 16).

The plaintiffs averred that they had been deprived of their liberty and property without due process of law and denied the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States; and that they no longer have the freedom of the elections guaranteed by Article I, Section 5 of the Pennsylvania Constitution, and the right to vote, as set forth in Article VIII, Section 1 of the Pennsylvania Constitution has been infringed.

Plaintiffs prayed that the court declare unconstitutional the Pennsylvania Apportionment Act of 1921, as amended, and direct the defendant members of the General Assembly to pass a new Apportionment Act and restrain the Secretary of the Commonwealth from any act for the holding of elections for members of the General Assembly until such time as the General Assembly should enact a reapportionment statute.

By order dated September 22, 1951, the three-judge district court dismissed the suit for want of equity.

The opinion of the District Court by Circuit Judge Biggs held that in view of the fact that the 1951 General Assembly was in session, the suit was prematurely brought.

Judge Bard, in a concurring opinion, held that the suit should be dismissed on the ground that plaintiffs had shown no violation of a Federal right.

The Commonwealth of Pennsylvania cannot be sued in the District Court of the United States without its consent and such consent has not been given by the Constitution or statutes of the Commonwealth.

This suit against the Secretary of the Commonwealth and the members of the House of Representatives and the

Senate is a suit against the Commonwealth of Pennsylvania.

This court has frequently held that a suit against a public official of the United States in his official capacity is a suit against the United States:

> *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 118 (1937);
> *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 78 (1935).

The same principle governs suits against officials of the Commonwealth of Pennsylvania. Consent of the Commonwealth of Pennsylvania to be sued has not been given:

> *Merchants' Warehouse Co.* v. *Gelder*, 349 Pa. 1, 7-8 (1944);
> *Kauffman Construction Co.* v. *Holcomb*, 357 Pa. 514, 516 (1947).

A State cannot be sued without its consent, in a District Court of the United States by one of its own citizens although the latter alleges that the case arises under the Constitution or laws of the United States:

> *Hans* v. *Louisiana*, 134 U. S. 1, 17-18 (1890);
> *Ex Parte Young*, 209 U. S. 123, 150 (1908).

In their complaint plaintiffs "particularly pray" that the court grant further relief—

> "A. To direct the defendants, legislators of the 1951 General Assembly of the Commonwealth of Pennsylvania, to reapportion the State senatorial and representative districts according to the 1930 United States decennial census in accordance with the requirements of the Constitution of the Commonwealth of Pennsylvania, and upon failure of the said defendants to so reapportion by the end of the present session of the

said Assembly to adjudge the said defendant legislators in contempt of your Honorable Court."

The plaintiffs here do not seek to enjoin the legislators from doing an *ultra vires* act, or an unlawful act, or an act in their private capacities. Plaintiffs ask the court to compel the legislators to do an act which they can only perform in their official capacities.

Prayer B asks that the court restrain the Secretary of the Commonwealth from doing any act for the holding of elections for members of the General Assembly in the election districts as established by the Pennsylvania Act of 1921, until the General Assembly shall reenact reapportioning legislation.

This prayer, we believe is ancillary to prayer A. If not, what may not be done directly by mandamus (prayer A) may not be done indirectly by injunction (prayer B); *Colegrove* v. *Green*, quoted infra p. 6.

The issue raised by the complaint is purely political . . .

A similar situation was presented in the very recent case of *South* v. *Peters*, 339 U. S. 276 (1950), in which this Court said:

"* * * Appellants, residents of the most populous county in the State, contend that their votes and those of all other voters in that county have on the average but one-tenth the weight of those in the other counties. Urging that this amounts to an unconstitutional discrimination against them, appellants brought this suit to restrain adherence to the statute in the forthcoming Democratic Party primary for United States Senator, Governor and other state offices.

"The court below dismissed appellants' petition. 89 F. Supp. 672. We affirm. Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geograph-

ical distribution of electoral strength among its political subdivisions. See MacDougall v. Green, 335 U. S. 281 (1948); Colegrove v. Green, 328 U. S. 549 (1946); Wood v. Broom, 287 U. S. 1, 8 (1932); cf. Johnson v. Stevenson, 170 F. 2d 108 (C. A. 5th Cir., 1948)." (277)

Other decisions to the same effect are:

Saunders v. *Wilkins*, 152 F. 2d 235, 237, certiorari denied in 328 U. S. 870 and rehearing denied in 329 U. S. 825 (1946);

Snowden v. *Hughes*, 321 U. S. 1, 15-16 (1944).

In *Colegrove* v. *Green*, 328 U. S. 549 (1946), Mr. Justice Frankfurter said:

"* * * An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate.

"The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. The Constitution enjoins upon Congress the duty of apportioning Representatives 'among the several States . . . according to their respective Numbers, . . .' Article I, Section 2. Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to any one that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. 'What might not be done directly by mandamus, could not be attained indirectly by injunction.' Chafee, Congressional Reapportionment (1929) 42 Harv. L. Rev. 1015, 1019. * * *"

This case is utterly free of any intentional or purposeful discrimination against any class or individual in the matter of the right to vote.

In *Snowden* v. *Hughes*, 321 U. S. 1, (1944), Chief Justice Stone said:

> "The unlawful administration by State officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. * * * But a discriminatory purpose is not presumed, Tarrance v. State of Florida, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572; there must be a showing of 'clear and intentional discrimination' Gundling v. City of Chicago, 177 U. S. 183, 186 * * *" (8)

The fact that the growth of population "dilutes" the vote in a particular district, has been held insufficient to show a violation of the Federal Constitution;

Colegrove v. *Green*, 328 U. S. 549 (1946);
Saunders v. *Wilkins*, 152 F. 2d 235, 237 (1945);
MacDougall v. *Green*, 335 U. S. 281 (1948);
South v. *Peters*, 339 U. S. 276 (1950).

What is a political question is determined not merely by abstract theory but by practical considerations.

In *Coleman* v. *Miller*, 307 U. S. 433 (1939), Chief Justice Hughes said:

> "It would unduly lengthen this opinion to attempt to review our decisions as to the class of questions

deemed to be political and not justiciable. In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. * * *" (454-455)

Respectfully submitted,

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(S.) ROBERT M. MOUNTENAY,
Deputy Attorney General.

(S.) ROBERT E. WOODSIDE,
Attorney General.

Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 503

ROBERT H. REMMEY, JR., CLARENCE BERTOLET, FRANK BRUCKERL,

Appellants,

v.

GENE D. SMITH, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA AND ANTHONY J. DeSILVESTRO, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Now comes the appellees Gene D. Smith, Secretary of the Commonwealth of Pennsylvania and Anthony J. DeSilvestro, A. Evans Kephart, John R. Meade, John J. McCreesh, Israel Stiefel, Martin Silvert, Maxwell S. Rosenfeld, John F. Byrne, G. Robert Watkins, Edward B. Watson, Frank W. Ruth, Henry J. Propert, Edward J. Kessler, Montgomery F. Crowe, M. Harvey Taylor, Tilghman A. Freed, G. Graybill Diehm, Joseph J. Yosko, George

B. Scarlett, T. Newell Wood, Patrick J. Toole, Hugh J. McMenamin, Guy B. Robinson, John G. Snowden, James S. Berger, George B. Stevenson, Samuel B. Wolfe, George M. Leader, Paul L. Wagner, Charles R. Mallery, George N. Wade, Eustace H. Bane, Doland R. McPherson, Jr., A. H. Letzler, John J. Haluska, Fred P. Hare, Jr., Murray Peelor, Elmer J. Holland, John H. Dent, Robert D. Fleming, Albert R. Peehan, Bernard B. McGinnis, Joseph M. Barr, John M. Walker, Thomas E. Barrett, William J. Lane, Samuel G. Neff, Leroy E. Chapman, C. Arthur Blass, Rowland B. Mahany, James J. Dougherty, George T. Guarnieri, Frank A. Costa, Frank Cella, Louis Sax, Cornelius J. Loftus, Louis J. Amarando, Mary A. Varallo, Thomas P. Peta, Lewis M. Mintess, Granville E. Jones, Arthur Rubin, John R. McCormack, Herman J. Tahl, Francis X. Muldowney, Joseph C. Coyle, Miles W. Lederer, Albert L. Pfaff, William Limper, Harry Pichney, Edwin F. Thompson, Wilbur H. Hamilton, Charles C. Smith, Herman Toll, Albert Leven, Dennie W. Hoggard, Samuel Rose, Edward J. Conway, Leon J. Kolankiewicz, Martin J. Taylor, Eugene J. Hagerty, Joseph J. Hersch, Edward Duffy, Jr., J. Thompson Pettigrew, Joseph A. McGee, Morris Rosen, Susie Monroe, John J. Welsh, Joseph A. Scanlon, George A. Penglase, James A. Byrne, H. Earl Pitzer, Daniel A. Verona, Paul F. Jones, Walter T. Kamyk, George J. Saraf, Edward A. Schuster, Joseph P. Rigby, Theodore H. Schmidt, Louis Leonard, Olaf E. Olsen, Paul F. Lutty, Martin C. Mihm, Andrew T. Fenrich, Patrick J. Corr, Thomas V. McNally, William J. Yester, B. Frank Hunter, J. P. Moran, George E. Jenkins, Albert E. Beech, David M. Boies, Jules Filo, George W. Cooper, Donald L. Thompson, John R. Haudenshield, Edwin C. Ewing, Thomas P. Geer, Raymond E. Wilt, W. Stuart Helm, W. Mack Guthrie, Robert K. Hamilton, John C. Miller, Robert R. Clapper,

Robert S. Readinger, John C. Kubacki, Leroy A. Weidner, J. Hiram Swope, Harold A. Yetzer, Harold G. Miller, D. Raymond Sollenberger, Daniel H. Erb, Albert E. Madigan, Marvin V. Keller, Wilson L. Yeakel, Thomas H. Greer, Jr., Harvey A. Moore, Hiram G. Andrews, Raymond E. McDermit, Dennis L. Westrick, Louis Rovansek, Philip Lopresti, Edwin W. Tompkins, William Z. Scott, Preston A. Frost, William E. Brown, Amos M. Leisey, Thomas P. Harney, Paige Varner, Harris G. Breth, John E. DuBois, Jr., Clarence E. Moore, H. Clayton Beaver, Robert F. Kent, Clarence G. Stoner, Huette F. Dowling, Nolan F. Zeigler, Edward E. Swartz, Blaine C. Hocker, Louis A. Bloom, Robert J. Clendening, William C. Leonard, James N. Robertson, Herbert P. Sorg, Delbert W. Dalrumple, Julian Polaski, Wilmer W. Waterhouse, Stanley L. Blair, Robert Wheeler, Jr., E. Gadd Snider, Nicholas Kornick, Harry Cochran, James K. Davis, Wilbur F. Barkdoll, Ralph E. Berkstresser, Russell Headlee, Maurice L. Banker, William R. McMillen, Earle E. Hewitt, Sr., Samuel B. Dennison, Harry J. Graybill, Michael J. Needham, Robert A. Price, William J. Reidenbach, Joseph G. Wargo, Marion L. Munley, Harry C. Spencer, Paul G. Murray, Baker Royer, Norman Wood, Walter L. Bomberger, Robert M. White, II, William H. McCullough, John H. Light, Reginald P. Stimmel, John T. Van Sant, Marion E. Markley, John J. Mikula, William P. Kohl, James Musto, Leonard A. Najaka, Leo A. Filip, Harold E. Flack, Vincent F. Gutendorf, James J. Jump, Ray L. Riley, James J. Gleason, Albert W. Johnson, Edward M. Young, George F. McConnell, Harry W. Price, Jr., John S. Shotwell, John A. LaFore, Jr., Thomas H. W. Jones, Howard F. Boorse, Raymond C. Kratz, William A. Bolton, John M. Reilly, Francis W. Bucchin, James L. Gaffney, Elwood M. Good, John M. Jones, Adam T. Bower, John F. Stank, Edward Dunn,

T. Luke Toomey, August Metz, Jr., Wrayburn B. Hall, Gus E. Waechaus, George C. Shoemaker, Wayne B. Breisch, G. Edgar Kline, Ivan C. Watkins, Ellis E. Ferster, J. Irving Whalley, Harry A. Naugle, Walter Baumunk, Harold G. Westcott, Harry R. McInroy, Charles R. Reagan, John H. McKinney, Allen M. Gibson, J. Dean Polen, John Mazza, Russell E. Reese, C. O. Williams, George W. Firmstone, C. Blair Lyons, John R. Madden, James E. Lovett, Anthony J. Petrosky, Charles J. Mills, H. J. Maxwell, Ray W. Greenwood, Harry E. Seyler, Luther L. Bear, George A. Goodling, and move that the appeal in the above case be dismissed on the ground that the case presents no substantial Federal question, and it further moves that, if the motion to dismiss be not granted, this court affirm the decision of the United States District Court for the Eastern District of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument. In support of this motion the appellees advance the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

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